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No. 08-322

IN THE
Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL
OF THE UNITED STATES OF AMERICA, ET AL.,

Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

BRIEF FOR NATHANIEL PERSILY, STEPHEN ANSOLABEHERE, AND CHARLES STEWART III AS *AMICI CURIAE* ON BEHALF OF NEITHER PARTY

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INTEREST OF THE *AMICI CURIAE*

Professor Nathaniel Persily, Professor Stephen Ansolabehere, and Professor Charles Stewart III are political scientists who have written extensively on American politics and the regulation of elections.[1] They take an interest in this case because they often serve as consultants in matters of redistricting and election reform governed by the Voting Rights Act (VRA). Professor Persily is the Charles Keller Beekman Professor of Law and Political Science at Columbia Law School. He has been called upon, particularly by courts, to draw redistricting plans for jurisdictions that are both covered and not covered by section 5 of the Voting Rights Act. *See Larios v. Cox*, 314 F. Supp. 2d 1357 (N.D. Ga. 2004); *In re Legislative Redistricting of State*, 805 A.2d 292 (Md. 2002); *Rodriguez v. Pataki*, 2002 WL 1058054 (S.D.N.Y. May 24, 2002). Professor Ansolabehere is Professor of Government at Harvard University. Professor Stewart is the Kenan Sahin Distinguished Professor of Political Science and Head of the Political Science Department at the Massachusetts Institute of Technology. Professors Ansolabehere and Stewart led the Caltech-MIT Voting Technology project following the 2000 election and,

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, or their counsel made a monetary contribution intended to fund its preparation or submission. The parties have consented to the filing of this brief. All parties, other than the Attorney General of the United States have filed written consents. The written consent for the United States is being submitted herewith.

along with Professor Persily, have remained actively involved in election reform projects at the state and federal level.

Amici also take a particular interest in this case because of their ongoing research concerning race and voting in American elections. *Amici* have analyzed the exit polls and results from recent elections with an eye toward assessing any changes in voting patterns among racial groups. Because the existence and extent of such changes in the covered and noncovered jurisdictions have become part of the debate over Section 5 of the VRA, *amici* believe their research might be of use to the Court in this case.

Amici submit this brief on behalf of neither party in this case with the limited goal of providing the Court with presidential election data that might be relevant to arguments made by the parties. *Amici* take no position on the statutory or constitutional issues involved in this case.

SUMMARY OF ARGUMENT

The election of an African American as president of the United States was inconceivable at the time of the passage of the original Voting Rights Act (VRA) and remained an unlikely possibility even at the time of the 2006 reauthorization. It is no surprise, then, that the election of President Barack Obama has led some to question the continued utility and relevance of Section 5 of the Voting Rights Act. In particular, critics view the broad interracial coalition of support that aided in his victory as demonstrating a fundamental alteration in

historic patterns of race and political preference. *See* Br. for Appellants at 3. The data from the 2008 election, however, do not indicate a profound disruption in the well-known correlations between race and vote choice.

The gap in candidate preferences between white and minority voters grew in 2008, as did the gap between the jurisdictions' covered and not covered by Section 5 of the VRA. Specifically, President Obama's victory derived from an increase in his share of the white vote in the noncovered jurisdictions and a nationwide increase in his share of the vote cast by racial minorities. Whites in the covered jurisdictions did not cross over in significant numbers to vote for Obama. In several of the covered states, he did worse among white voters than the Democratic nominee four years earlier. Despite a nationwide Democratic swing and an increase of approximately three percentage points in the share of the white vote nationwide, Obama won only one fully covered state (Virginia).

Far from suggesting a break with the voting patterns of the past, the 2008 election revealed the intransigence of racial differences in voting patterns. Whites and racial minorities in the covered jurisdictions, then as now, tend to favor different candidates at the polls. Moreover, whites of every partisan affiliation in the covered jurisdictions were less likely to vote for Obama than were their copartisans in the noncovered jurisdictions. Even when controlling for vote choice in the 2004 election, the racial composition of jurisdictions remains a statistically significant factor in explaining voting preferences in 2008. Indeed, in 2008 race played a greater role in vote choice in the covered than in the noncovered jurisdictions.

ARGUMENT

I. The Results of the 2008 Election Do Not Indicate Any Substantial Disruption in Historical or Geographic Patterns of Race and Political Preference.

Among the other findings it made to justify retaining coverage for certain jurisdictions under the Voting Rights Act, Congress found that "The continued evidence of racially polarized voting in each of the [covered] jurisdictions . . . demonstrates that racial and language minorities remain politically vulnerable, warranting the continued protection of the Voting Rights Act of 1965." *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b)(3), 120 Stat. 577. Such a finding was based on testimony the House and Senate Judiciary Committees heard suggesting that, due to the interaction of racially divergent voting patterns and certain electoral structures, minorities in the covered jurisdictions are less likely to elect their preferred candidates. *See, e.g., Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 109th Congress 49 (2005) (testimony of Richard Engstrom); *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 14, 26 (2006) (testimony of Theodore S. Arrington); *id.* at 48 (testimony of Anita Earls). Congress focused on state and local elections given the prevalence of Section 5 activity at smaller levels of government and the greater ease of measuring racial differences in voting

in such elections. With respect to those elections, Congress found that, in the covered jurisdictions, whites and racial minorities tend to favor different candidates at the polls.

Because of the unprecedented and, until recently, highly improbable election of an African American as President, questions have naturally arisen as to whether racial differences in voting patterns have diminished. More specifically, if such changes have taken place, among which voters and in which states has the racial gap in voter preferences narrowed? In particular, do the results of the 2008 election indicate profound changes in the voting preferences of whites in the covered jurisdictions or at least, a lower correlation there between race and vote choice?

Contrary to the view that Obama's victory arose from a nationally uniform and widespread interracial coalition, the data suggest persistent geographic and racial differences in the 2008 election. In particular, Obama only made gains relative to 2004 among whites in the noncovered jurisdictions and among racial minorities nationwide. The result has been a widening of the gap in political preferences between racial groups and a greater differentiation between the covered and noncovered jurisdictions.

A. Presidential Election Exit Polls from 2004 and 2008 Do Not Indicate a Reduction in the Political Differences Between Minorities and Whites in the Covered Jurisdictions.

Data from presidential election exit polls in 2004 and 2008 reveal, if anything, an increase in the differences between whites and minorities in the covered jurisdictions. This is due both to the relative reluctance of whites to vote for Barack Obama and to the increased cohesion among minority voters. The data also point to growing differences between the covered and noncovered jurisdictions concerning the relationship between race and candidate preference.

Table 1 presents the exit poll results from the covered and noncovered states. For purposes of this analysis and because exit poll samples are only available and reliable (if at all) at the state level, we count as "covered states" only those states that the Department of Justice designates as "covered" on its website. See Section 5 Covered Jurisdictions, http://www.usdoj.gov/crt/voting/sec_5/covered.php (listing as covered states: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas and Virginia). Although fifteen political subdivisions in Virginia have bailed out of coverage, we follow the DOJ's practice and include Virginia as a "covered state."[2] The remaining

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[2] Doing so, if anything, reduces the differences among racial groups in the covered jurisdictions, since the gap between whites and minorities in Virginia has been smaller than the average covered state.

states we designate as "noncovered states", even though some of those states contain municipalities that are covered.[3] In the Appendix we separate out each category of jurisdiction, depending on whether it has any covered municipalities or not. Moreover, the regressions of election results, discussed later, largely avoid this categorization problem by grouping all covered counties together.

The largest changes in voting in the covered jurisdictions appear from the exit polls to have occurred among African American and Latino respondents. Obama received 11 percentage points more of the Black vote than did John Kerry in 2004, to achieve near unanimity (97 percent) among African American respondents. His percentage among Latinos also appeared to increase (13 percentage points) to 62 percent. In stark contrast, he appeared to make no gains among white respondents in the covered jurisdictions. Only 26 percent of whites in the covered jurisdictions reported voting for Obama, the same percentage received by John Kerry in 2004. The result was a widening of the gap between African Americans and whites to 71 percentage points and between Latinos and whites to 36 percentage points.

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[3] We do so because, in the noncovered states with covered municipalities, only a minority of the population – in most such states, a very small minority – is actually covered. North Carolina is the partially covered state with the greatest share (36 percent) of its population covered. New York is second with 28 percent of its population covered. In all other partially covered states, the share of the state's population that is covered is negligible.

Table 1. Reported vote by racial groups in 2004 and 2008 Presidential elections, national exit polls[4]

	Covered States		Noncovered States	
Group	2008 (%)	Change from 2004	2008 (%)	Change from 2004
White	26	0	48	4**
Black	97	11**	95	10**
Latino	62	13**	69	9**
Whites				
Democrats	76	–5**	86	1
Republicans	4	1**	10	3**
Independents	31	–2	50	0
Difference				
Black-white	71	11**	47	6**
Latino-white	36	13**	21	5**

**p<.01

The story is somewhat different for the noncovered jurisdictions where, compared to the Democratic

[4] The source for the 2004 exit poll data is National Election Pool, Edison Media Research, & Mitofsky International, *National Election Pool General Election Exit Polls, 2004*, *available at* http://dx.doi.org/10.3886/ICPSR04181 (dataset excludes South Dakota). The source for the 2008 exit poll data is MSNBC, Politics, 2008 Results, Exit Polls, http://www.msnbc.msn.com/id/26843704.

nominee in 2004, Obama appeared to post gains among respondents from all racial groups. The gains among minority voters were still larger (10 points among African Americans and 9 points among Latinos) than the gains among whites (4 points). However, Obama's share of the white vote in the noncovered states (48 percent) was over twenty points larger than that in the covered states (26 percent), and appears to have occurred among white respondents from all partisan subgroups. At the same time, the exit polls suggest that he received about the same share of the African American vote (95 percent) and a somewhat larger share of the Latino vote (69 percent versus 62 percent) in the noncovered jurisdictions. A substantial gap in reported voting preferences between racial groups exists in the noncovered jurisdictions, as well, but the gap is noticeably smaller than that in the covered jurisdictions. The difference between African Americans and whites was 47 percentage points, and the difference between Latinos and whites was 21 percentage points.

Because the reliability of exit polls depends on their sampling design and a host of other factors, caution is warranted in overinterpreting the differences between the 2004 and 2008 exit polls. One can note with confidence that large and statistically significant differences between racial groups existed in the covered jurisdictions in 2008, and that the differences between whites in the covered and noncovered jurisdictions reach conventional levels of statistical significance. However, to understand what is happening in each category of jurisdictions one must dig deeper into the data.

Because averaging all of the covered states together may obscure variations between them, Table 2 presents the exit poll data for all fifty states. The states are placed in the order from lowest to highest in terms of the share of white voters reporting that they voted for Obama. The six states with the lowest percentages of white respondents who reported voting for Obama are covered states. Three of those states (Alabama, Mississippi, and Louisiana) reported a drop in the white vote for the Democratic nominee since 2004. All of the covered states are below the national share of the reported white vote received by Obama.

It should also be noted that the five states that report the lowest levels of white voting for Obama and the largest gap between whites and African Americans in terms of Obama's reported vote share are also the states with some of the largest African American population shares. These five states are among the top six states in terms of the share of the population that is African American. According to the 2006 Census population estimates, Mississippi (37 percent), Louisiana (32 percent), Georgia (30 percent), Maryland (29 percent), South Carolina (29 percent), and Alabama (26 percent) have the highest African American population shares of any state. *See* U.S. Census Bureau, State Population Estimates-Characteristics, available at http://www.census.gov/popest/states/asrh/SC-EST2006-03.html . All but Maryland are covered by Section 5 of the Voting Rights Act.

Table 2. Racial breakdown of Obama support by state, 2008 exit polls.[5]

State	% of Whites Voting for Obama	Change in White Vote-share from 2004	% of White Demo-crats Voting for Obama	% of Blacks Voting for Obama
Alabama	10	–9**	47	98
Mississippi	11	–3	NA	98
Louisiana	14	–10**	38	94
Georgia	23	0	78	98
South Carolina	26	4*	80	96
Texas	26	1	78	98
Oklahoma	29	1	59	NA
Arkansas	30	–6**	68	95
Utah	31	7**	NA	NA
Wyoming	32	4	80	NA
Alaska	33	1	86	NA
Idaho	33	4	89	NA
Tennessee	34	0	79	94
North Carolina	35	8**	83	95
Kentucky	36	2	62	90
Nebraska	39	6**	83	NA
Virginia	39	7**	86	92
Arizona	40	0	83	NA
Kansas	40	6*	85	NA
South Dakota	41	4*	82	NA

[5] *p<.05, **p<.01. The sources for the 2004 and 2008 exit poll data are provided in note 4 *supra*. Covered states are indicated in bold, partially covered states are underlined. "NA" indicates that due to small sample sizes cell entries are not available.

West Virginia	41	-1	69	NA
Florida	42	1	81	96
Missouri	42	0	84	93
New Mexico	42	-1	85	NA
North Dakota	42	7**	90	NA
United States	*43*	*3***	*85*	*95*
Indiana	45	11**	86	90
Montana	45	7**	91	NA
Nevada	45	2	90	94
Ohio	46	3	85	97
Maryland	47	3	83	94
Penn-sylvania	48	3	85	95
New Jersey	49	3	85	92
Colorado	50	9**	95	NA
Connecticut	51	1	86	93
Illinois	51	3	86	96
Iowa	51	3*	93	93
Michigan	51	8**	91	97
California	52	5**	91	94
New York	52	4	85	100
Delaware	53	9**	86	99
Minnesota	53	3*	94	NA
New Hampshire	54	4**	92	NA
Wisconsin	54	7**	95	91
Washington	55	4*	95	NA
Oregon	57	8**	92	NA
Maine	58	5**	89	NA
Rhode Island	58	1	89	NA
Mass-achusetts	59	1	86	NA
Vermont	68	11**	96	NA
Hawaii	70	12**	96	NA
DC	86	6	97	97

B. The 2004 and 2008 Presidential Election Results at the County Level Do Not Indicate a Reduction in the Political Differences Between Minorities and Whites in the Covered Jurisdictions.

The inferences drawn from the exit polls are confirmed by an analysis of the county-level results for the 2004 and 2008 presidential elections. Such data have the added virtue of generating a more comprehensive description of all covered counties, not just covered states. They also allow for a more accurate assessment of the racial composition of each class of jurisdictions, because the census includes a richer description of the race of the covered and noncovered populations. The large number of counties, moreover, should generate greater confidence in some of the differences among racial groups toward which the exit polls may have hinted.

Table 3 presents the data analysis that is graphically depicted in Figure A. The analysis consists of using linear regression to predict the county vote for Barack Obama in 2008, as a function of the combined Black and Hispanic population share in each county. The analysis is run separately for covered and noncovered counties. The county demographic data come from Census Bureau estimates as of 2006.[6] County level election results come from the websites of each state's chief elections official.[7] Every county covered by the Voting

[6] Bureau of the Census, *State and County Quickfacts*, *available at* http://quickfacts.census.gov/qfd/index.html.

[7] The one exception is Massachusetts, for which results from the *USA Today* website were used. That state has not yet released official results from the 2008 election.

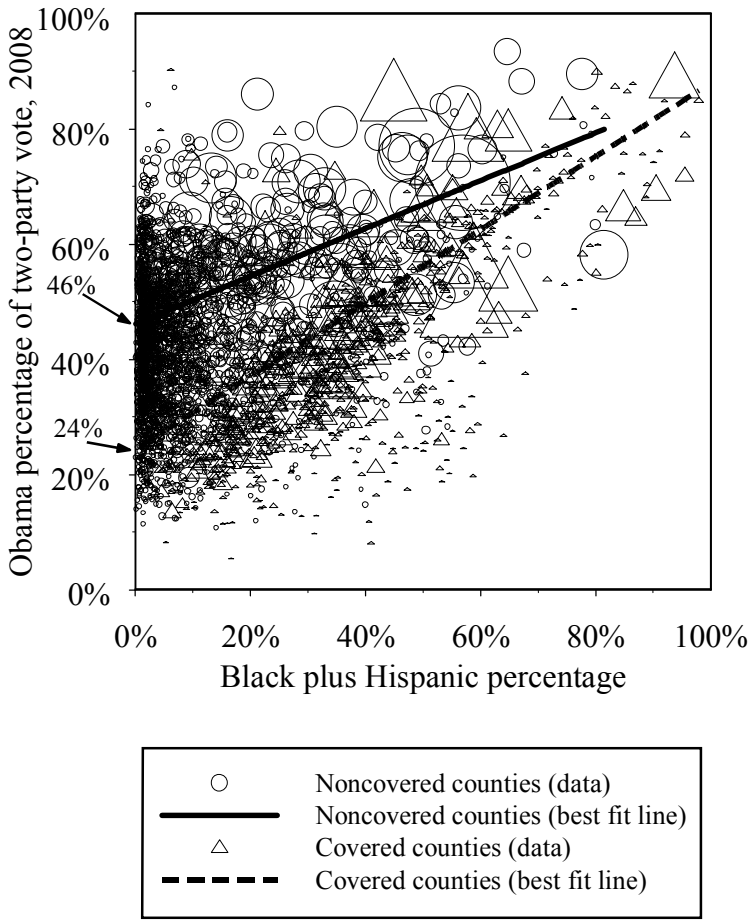
Rights Act is considered a "covered county" in this analysis. Noncovered counties that contain covered townships are considered not to be covered in this analysis, because the covered townships comprise a very small percentage (never more than nine percent) of the population of these counties. Treating these counties as covered does not change the results in any meaningful way, however. Because Alaska does not release election results at the county level, the state of Alaska is considered one large county for purposes of the regression analysis throughout this brief. Adding or subtracting Alaska from the regressions or analysis does not change the results in any meaningful way. In the analysis that follows, each observation (county) is weighted by the number of total votes cast in the county in the 2008 presidential election. In the graph that illustrates the analysis, the size of the triangles and circles are proportional to the number of votes cast.

Table 3. Regression predicting the two-party vote for Barack Obama in the 2008 presidential election at the county level.

	Covered counties	Noncovered counties
Combined Black and Hispanic Percentage of County	0.635*** (0.022)	0.415*** (0.013)
Intercept	0.244*** (0.009)	0.461*** (0.004)
N	860	2,254
R^2	.496	.307

***p<.001. Numbers in parentheses are standard errors.

Figure A. Relationship between 2008 presidential vote and Black and Hispanic population share, covered and noncovered counties.



The most important statistic derived from this analysis is the y-intercept for each of the regression lines. These intercepts are labeled on Figure A. Because

the y-intercept is the predicted fraction of the vote cast for Barack Obama in counties with no African Americans or Hispanics, the intercept provides an independent estimate of the percentage of white voters[8] who voted for the minority-preferred candidate in 2004.

As with the exit polls, the regressions indicate a lower share of whites in the covered jurisdictions willing to vote for the general election candidate preferred by African Americans and Hispanics. The y-intercept in the regressions suggests that, in covered counties without any Africans Americans or Hispanics, 24 percent of the population voted for Obama. In contrast, the regressions reveal that about 46 percent of voters in the noncovered counties with no African Americans or Hispanics voted for Obama. By this estimate, the largely white noncovered counties differed from the largely white covered counties in their support for Barack Obama by 22 percentage points.

The slope of the regression is also an important indicator of the divergence between whites and minorities in their voting patterns. The steeper the slope, the more that counties differ from each other based on their racial makeup. In 2008, the slope of the relationship is 0.635 in covered jurisdictions, which is consistent with an estimate that counties that were 100 percent African American and Hispanic would differ by 63.5 percentage points from counties without any African Americans or Hispanics in their level of support

[8] It may perhaps be more accurate to say voters who are neither Black nor Hispanic.

for Obama. In contrast, the slope of the relationship is only 0.415 in the noncovered jurisdictions.

As the exit polls suggested, partisanship does not explain away the differences between the covered and noncovered jurisdictions. In fact, even when one controls for a county's previous voting history, its racial composition remains a statistically significant variable in predicting Obama's share of the county vote. Table 4 presents a multivariate regression with the dependent variable being the difference between Obama and Kerry's voteshare in a county. As the coefficients demonstrate, the white percentage of the county has a statistically significant negative relationship to Obama's gain in voteshare over 2004. This relationship is twice as large (-0.111 versus -0.047) for the covered jurisdictions than the noncovered jurisdictions. In other words, even when one controls for past vote for the Democratic presidential nominee, the effect of race on vote choice remains, as does the greater influence of race in the covered jurisdictions.

Table 4. Regression predicting the difference in county-based election results for Democratic candidate in 2008 and 2004.

	Covered	Noncovered
Percentage of county population that is white	-0.111*** (0.009)	-0.047*** (0.004)
Intercept	0.111*** (0.005)	0.086*** (0.003)
N	860	2,254
R^2	.159	.06

***p<.001. Standard errors in parentheses.

CONCLUSION

For scholars of election law and the Voting Rights Act, the unprecedented 2008 election provided a unique opportunity to evaluate whether well-known patterns concerning race and vote choice had changed in a fundamental way. The data from the 2008 election do not suggest any such deep structural changes in voting behavior. Most of the movement between 2004 and 2008 occurred among nonwhites, who voted in greater numbers for Obama. Any added voteshare for Obama among whites occurred principally in the noncovered jurisdictions. The gaps between racial groups in the covered jurisdictions appeared, in fact, to grow in 2008.

None of this is to take away from the historical significance of the 2008 election. Indeed, the unprecedented result is a testament to how far the nation has come since the Voting Rights Act was first passed. Progress with respect to the diminution of racial differences in voting has been uneven, however. The data from this historic election do not provide evidence of substantial change in the geography of racially differential voting patterns.

Respectfully submitted,

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APPENDIX

APPENDIX

Support for Barack Obama by Racial Group, 2008 Presidential Election, National Exit Polls.[9]

Group	Covered States	Non-covered States with Covered Areas	Totally Non-covered States	Non-covered + partially covered
White	26	48	47	48
Black	97	96	94	95
Latino	62	68	71	69
Whites				
Democrats	76	87	86	86
Republicans	4	10	10	10
Independents	31	49	50	50
Polarization				
Black-White	71	48	47	47
Latino-White	36	20	24	21

9. Source for data cited in note 4 *supra*.